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In the Supreme Court of the United States

OCTOBER TERM, [redacted] 1969

ROLF J. KOLDEN, PETITIONER

v.

SELECTIVE SERVICE LOCAL BOARD NO. 4

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR RESPONDENT IN OPPOSITION

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OPINIONS BELOW

The opinion of the district court (Pet. App. 18a–22a) is unreported. The opinion of the court of appeals (Pet. App. 1a–10a) is not yet reported.

JURISDICTION

The judgment of the court of appeals was entered on January 28, 1969. The petition for a writ of certiorari was filed on March 19, 1969. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether Section 10(b)(3) of the Military Selective Service Act of 1967 (50 U.S.C. App. 460(b)

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(3)) prohibits pre-induction judicial review of a 1-A delinquency reclassification of a graduate student formerly classified II-S.

STATUTES AND REGULATIONS INVOLVED

Section 10(b)(3) of the Military Selective Service Act of 1967 (50 U.S.C. App. (Supp. III) 460 (b)(3)) provides, in pertinent part:

> * * * No judicial review shall be made of the classification or processing of any registrant by local boards, appeal boards, or the President, except as a defense to a criminal prosecution instituted under section 12 of this title, after the registrant has responded either affirmatively or negatively to an order to report for induction, or for civilian work in the case of a registrant determined to be opposed to participation in war in any form: *Provided*, That such review shall go to the question of the jurisdiction herein reserved to local boards, appeal boards, and the President only when there is no basis in fact for the classification assigned to such registrant. * * *

Section 6(h)(2) of the Military Selective Service Act of 1967 (50 U.S.C. App. (Supp. III) 456(h)(2)) provides:

> (2) Except as otherwise provided in this subsection the President is authorized, under such rules and regulations as he may prescribe, to provide for the deferment from training and service in the Armed Forces of any or all categories of persons whose employment in industry, agriculture, or other occupations or

> employment, or whose continued service in an Office (other than an Office described in subsection (f)) under the United States or any State, territory, or possession, or the District of Columbia, or whose activity in graduate study, research, or medical, dental, veterinary, optometric, osteopathic, scientific, pharmaceutical, chiropractic, chiropodial, or other endeavors is found to be necessary to the maintenance of the national health, safety, or interest: *Provided,* That no person within any such category shall be deferred except upon the basis of his individual status: *Provided Further,* That persons who are or may be deferred under the provisions of this section shall remain liable for training and service in the Armed Forces under the provisions of section 4(a) of this Act until the thirty-fifth anniversary of the date of their birth. This proviso shall not be construed to prevent the continued deferment of such persons if otherwise deferrable under any other provision of this Act. * * *

32 C.F.R. 1642.4 provides, in pertinent part:

> (a) Whenever a registrant has failed to perform any duty or duties required of him under the selective service law other than the duty to comply with an Order to Report for Induction (SSS Form No. 252) or the duty to comply with an Order to Report for Civilian Work and Statement of Employer (SSS Form No. 153), the local board may declare him to be a delinquent.

STATEMENT

On December 1, 1967, petitioner, a third-year graduate student with a Selective Service classification of

II–S, was declared to be a delinquent for failing to have his Registration Certificate and Notice of Classification in his personal possession,[1] as required by 32 C.F.R. 1617.1 and 1623.5. On the same day he was reclassified I–A by his local board, pursuant to 32 C.F.R. 1642.12 (Pet. App. 2a).[2]

In February 1968, petitioner brought this pre-induction suit to overturn his I–A classification and enjoin his induction into the Armed Forces (Pet. App. 2a). On April 9, 1968, the district court denied petitioner's motion for a temporary injunction on the ground that Section 10(b)(3) of the Military Selective Service Act of 1967 (50 U.S.C. App. 460(b)(3)) barred pre-induction judicial review of petitioner's reclassification. The court of appeals, relying on this Court's decisions in *Oestereich* v. *Selective Service Board No. 11*, 393 U.S. 233, and *Clark* v. *Gabriel*, 393 U.S. 256, affirmed.

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[1] On November 8, 1967, petitioner notified his local board that he had surrendered his registration and classification cards at a rally on October 16, 1967, which protested against the Vietnam conflict (Pet. App. 1a–2a).

[2] 32 C.F.R. 1602.4 defines "delinquent" as a "person required to be registered under the selective service law who fails or neglects to perform any duty required of him under the provisions of the selective service law." 32 C.F.R. 1642.4(a) provides that "[w]henever a registrant has failed to perform any duty or duties required of him under the selective service law * * * the local board may declare him to be a delinquent." "Selective service law" is defined to include "title I of the Military Selective Service Act of 1967 [50 U.S.C. App. 451 *et seq.*] and all the rules and regulations issued thereunder" (32 C.F.R 1602.10).

ARGUMENT

This case presents substantially the same questions as does the petition in *Breen* v. *Selective Service Local Board No. 16*, pending on petition for a writ of certiorari, No. 1144, this Term. For the reasons set forth in our opposition to the *Breen* petition, we submit that the instant petition for a writ of certiorari should also be denied. Indeed, this case is a *fortiori* from *Breen* since, as petitioner concedes (Pet. 6), a wholly discretionary deferment of a graduate student under Section 6(h)(2), not the deferment of an undergraduate student as in *Breen*, is involved here (see Pet. App. 6a–9a).[3]

CONCLUSION

It is respectfully submitted that the petition for a writ of certiorari should be denied.

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[3] This is not to intimate that we agree with the implicit suggestion of the court below that, because of this point, the instant case and *Breen* might be distinguished (see Pet. App. 9a). Here the court expressly refrained from expressing a view on the applicability of Section 10(b)(3), as construed in *Oestereich*, to the situation of an undergraduate student deferment such as is involved in *Breen* (see Pet. App. 9a, n. 6).

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